

Greenhouse Gas Regulation Under the Clean Air Act in 2009 and Beyond

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§ 1.01. Introduction.

Less than a week after taking office, President Barack Obama directed the new Administrator of the Environmental Protection Agency (EPA) to reconsider EPA’s previous denial of a request by the State of California for a waiver to implement its state greenhouse gas standards for motor vehicles. This early action confirmed then-candidate Obama’s campaign commitment to move aggressively on climate change and begin to regulate greenhouse gases under existing authorities.

The pace of EPA activity in the last several months has been striking, and it provides further insight into the Administration’s agenda on climate

change. Within several months of President Obama taking office, EPA has (1) published a proposed rule to require mandatory monitoring and reporting of greenhouse gas emissions from thousands of sources, (2) announced plans to reconsider a Bush-era position on the applicability of certain Clean Air Act (CAA) programs to greenhouse gases, (3) proposed to find that greenhouse gases endanger public health and welfare, (4) announced plans to initiate a federal rulemaking for regulation of greenhouse gas emissions from mobile sources, and (5) granted California's waiver request.

EPA's separate but related actions raise critical questions about how, in timing and substance, EPA will carve a path of greenhouse gas regulation. One cannot consider these questions, moreover, without recognizing current congressional activity on energy and climate change, which undoubtedly has and will influence EPA decision-making.

This chapter examines the steps EPA has taken toward regulation of greenhouse gases, as well as the legal and policy issues that EPA faces as it decides how and when to proceed. It will begin by providing critical background information forming the legal framework for and leading up to EPA's recent rulemakings and related actions. It will then summarize and explain EPA's most recent decisions. It next discusses the regulations that are likely to emerge from EPA in both the near and far terms. Finally, it will consider the implications of proposed legislation that was recently passed by the U.S. House of Representatives on EPA's future regulatory authority over greenhouse gases.

§ 1.02. Background.

To understand how EPA has arrived at the brink of regulating greenhouse gases under the Clean Air Act — before Congress appears fully comfortable with imposing domestic controls — it is helpful to recall the steps leading to this point. We begin with the facts underlying the Supreme Court's 2007 decision in *Massachusetts v. EPA*.

[1] — Language of Clean Air Act (CAA) § 202 and Related Provisions.

Clean Air Act § 202(a)(1) provides that the Administrator “shall by regulation prescribe (and from time to time revise) . . . standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in his judgment cause, or